Supreme Court, U.S.
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No. 95-1962

In The

Supreme Court of the United States

October Term, 1995

REPUBLICAN PARTY OF ALASKA,

Petitioner,

v.

MIKE O'CALLAGHAN, JED WHITTAKER, ROBERT GIGLER, ALASKAN VOTERS FOR AN OPEN PRIMARY, AND STATE OF ALASKA, LIEUTENANT GOVERNOR JACK COGHILL, in his official capacity as Lieutenant Governor,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alaska

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Alaska Supreme Court correctly decided that the State of Alaska's blanket primary imposes a degree of interference with the Republican Party of Alaska's (hereinafter "RPA") First Amendment right of political association that is nondiscriminatory, minor, and justified by the State's interests in encouraging voter participation and choice, and ensuring that elected officials are responsive to their constituencies.

(2) Whether the Alaska Supreme Court correctly decided that the RPA's interests in preventing raiding by other political parties and nominating candidates who are more directly under the control of the party were not substantial enough to counterbalance interests of the state served by a blanket primary system.

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STATEMENT OF FACTS AND PROCEEDINGS

Respondent State of Alaska (hereinafter "the State") adopts and incorporates by reference the statement of facts and proceedings contained in the Order and Memorandum Opinion of the Alaska Supreme Court in *O'Callaghan v. Coghill*, reported at 888 P.2d 1302, 1303 (Alaska 1995), as supplemented by the final opinion in the case, reported at 914 P.2d 1250, 1252-1254 (Alaska 1996).

The State will address certain conclusions offered by the RPA in its statement of facts and proceedings. While it is true that the RPA or other parties were not afforded a trial to develop a factual record, the court took judicial notice of registration statistics and election returns presented in briefs of the parties. *See* 914 P.2d at 1256. The court addressed the necessity of a remand to develop a factual record as follows:

> We do not believe that fact finding is necessary or appropriate in this case. The issues are issues of law; the interests advanced in support of and in opposition to the blanket primary are not especially amenable to courtroom proof and such proof is not, in any case, required.

Id. at 1261 n.16.

The RPA makes a point of the State's change in position concerning the validity of the blanket primary. The RPA contends that "The First Amendment right of the RPA to free political association fell victim to the politics of the moment." RPA Pet. at 6 n.5. Governor Knowles, a Democrat, succeeded Walter J. Hickel, Alaska Independence Party, as governor barely two months

before the Alaska Supreme Court called for supplemental briefing on the validity of the blanket primary.

In the opinion ordering supplemental briefing, the court observed:

> [T]he State's contention that the blanket primary statute is clearly unconstitutional under *Tashjian*, 479 U.S. 208, 107 S.Ct. 544, is incorrect.

888 P.2d at 1304-05. Based on the erroneous assumption of clear invalidity, representatives of the Hickel administration entered into a stipulation with the RPA which ultimately led to the dismissal of *Zawacki v. Alaska*, Case No. A92-414 CIV (D. Alaska 1992) (reproduced at 888 P.2d at 1303) [hereinafter "the *Zawacki* stipulation"]. The State and the RPA agreed that the director of elections would adopt regulations imposing a partially closed primary favored by the RPA for the 1992 and 1994 primary elections. This mistake of law was material to the State's decision to agree to implement a partially closed primary.

Even though the question of the blanket primary has been a partisan issue in Alaska, there is widespread support for it among members of all political parties and unaffiliated voters. *See* 914 P.2d at 1255-56. The State determined to accept the responsibility of defending the validity of an enactment of the state legislature. It was a combination of the Alaska Supreme Court's insistence on a proper determination of the validity of a statute and a

change in administrations that lead to the state's realignment in the case, rather than "politics of the moment."[1]

Finally, the RPA alleges in its statement of fact and proceedings that the majority opinion "placed the burden of proof on the RPA to show a substantial burden to its associational rights." Pet. 7. (citation omitted). The Alaska Supreme Court applied the standard of review mandated in *Burdick v. Takushi*, 504 U.S. 428, 432-34 (1992). *See* 914 P.2d at 1253-54. In applying this standard the court weighed the interests propounded by the parties. The court found the interests of the RPA to be minor compared to the interests advanced by the state.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE ALASKA SUPREME COURT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

At the heart of this case is a claim by the RPA that it is being compelled by state law to associate with certain persons that do not share common political philosophies. The forced association allegedly occurs when the party nominates candidates for national and state offices. Under the prior decisions of this Court, the State must

[1] The assertion of partisan political motivation made by the RPA has not been limited to the State in this case. The record will show that the RPA moved to disqualify all justices of the Alaska Supreme Court, contending that the members of the court were acting according to a partisan political agenda. The court denied the motion.

demonstrate a substantial interest in its regulation of the activities of political parties. However, the demonstration required is less than that required for the regulation of other groups whose rights of association are not so imbued with governmental action. This deference rests on two established legal premises. First, states enjoy broad power to regulate political parties within their jurisdiction. *See American Party of Texas v. White*, 415 U.S. 767, 781 (1974) ("It is too plain for argument . . . that the State . . . may insist that intra-party competition be settled before the general election by primary election or by party convention."). Second, "[n]either the right to associate nor the right to participate in political activities is absolute." *Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 567 (1973).

Perhaps out of respect for the foregoing legal premises, no federal court has directly ruled on the validity of an open primary. A national political party attempted to test the validity of the Wisconsin open primary in *Democratic Party v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981). The decision in that case was limited because the Court avoided deciding whether the State of Wisconsin may hold an open primary in favor of deciding whether the results of the primary could be binding on the national party. *See id.* at 120-21. In a similar vein, the United States District Court for Minnesota refused to enjoin Minnesota's open primary. *See Anderson v. Growe*, 546 F. Supp. 482, 486 (D. Minn. 1982).

Decisions of the Court have focused on the validity of state statutes that prevent voters from one political party from voting for candidates of another political

party. These statutes have been upheld if the restriction is fair and reasonable.[2] A prior case of the Court suggests that a voter does not have a federal constitutional right to vote in a party primary when she or he is not a party member, where a statute precludes the voter from doing so.[3] However, these decisions are not concerned with the situation presented here. In Alaska, the state legislature has considered the history and particular needs of eligible voters and has decided to implement a process for the nomination of candidates "by direct vote of the people." Alaska Stat. § 15.25.010 (1988). Names of candidates are placed on the primary election ballot in groups seeking a particular office "without regard to party affiliation." *Id.* § 15.25.060 (Supp. 1995).

In the decision below, the Alaska Supreme Court applied the appropriate standard for resolving First Amendment claims developed in prior decisions of this Court.[4] The RPA argues that the manner in which the

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[2] *See, e.g. Kusper v. Pontikes*, 414 U.S. 51, 56-61 (1973) (striking down statute that prevented person from voting in primary if person had voted in another party's primary in past 23 months); *Rosario v. Rockefeller*, 410 U.S. 752, 760-62 (1973) (upholding statute requiring voters to register affiliation with party 30 days before general election in order to vote in next party primary).

[3] *See Nader v. Schaffer*, 429 U.S. 989 (1976) (mem.), *aff'g* 417 F. Supp. 837 (D. Conn. 1976).

[4] This Court explained the standard of review as follows

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward

standard was applied conflicts with prior decisions of this Court. The true nature of these claims was captured when the Court observed:

> Constitutional challenges to specific provisions of a State's election laws . . . cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983), *quoted in Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 213 (1986). The Alaska Supreme Court weighed the interests of the parties without benefit of a standard test for resolving the alleged violation of the rights of association of the RPA. The Alaska Supreme Court carefully articulated the interests of the State and the RPA and consistently applied the prior decisions of this Court in reaching its decision.

The RPA prefers a primary where voters registered as Republicans, voters claiming no party affiliation, and voters registered as nonpartisans would be permitted to nominate Republican candidates. A voter with a registration showing an affiliation with another recognized political party could not participate in the Republican primary. An affiliated voter choosing to participate in the Republican primary could change his or her registration

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> by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick, 504 U.S. at 434, *quoted in O'Callaghan*, 914 P.2d at 1254.

up to and including the day of election but could only participate in that primary.[5]

The RPA's preference is motivated by two interests. First, the party wants to prevent raiding by voters who are affiliated with other political parties. According to the RPA, raiders participate in another party's primary for the sole purpose of nominating a weak candidate to enhance the chances of election to office of a candidate of the raider's party.[6] Second, the party argues that its form of primary will produce elected representatives who are accountable to the principles and platform of the RPA. The Alaska Supreme Court, after examining the competing interests of the parties, found that the interests advanced by the RPA were minor when compared to the state's interests of promoting voter participation and ballot secrecy, and forestalling government by political machine.

The court found merit in the State's argument that raiding could not be a major concern if the party was willing to admit approximately 184,000 unaffiliated

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[5] The Alaska Supreme Court characterized this form of primary as "partially closed" because

> the primary is not a classic closed primary in that unaffiliated voters are allowed to participate, yet it does not meet the definition of an open primary, since it is not open to all registered voters.

914 P.2d at 1255.

[6] The record and petition contains only anecdotal evidence of raiding presented in the briefs of the RPA. Nonetheless, the Alaska Supreme Court acknowledged that this interest in preventing raiding was a legitimate concern, "even though its effects may be exaggerated." 914 P.2d at 1261.

voters to participate along with the 78,212 Republicans to nominate party candidates. *See* 914 P.2d at 1256, 1261.[7] Independent voters could participate in the Republican primary for the same reasons as a raider from another party. A statute requiring participation in a blanket primary along with voters affiliated with other political parties imposes a limited burden on the political association considered desirable by the RPA.[8]

The RPA's desire to make candidates accountable to it is in direct conflict with the state interest underlying the blanket primary, which is to make the candidates directly accountable to the voters. However, the party is not without a remedy. These conflicting state and party interests can be resolved by the state legislature.[9] If the party wants to change the law, it need not solely rely on the courts to accomplish its goal.

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[7] These figures refer to the registrations applicable to the 1994 primary and were used in the final opinion issued by the Alaska Supreme Court. *See* 914 P.2d at 1256. The RPA refers to more recent statistics in its petition. The State believes the number of registrations by party used by the RPA in the petition are accurate.

[8] The majority in *Tashjian* rejected Connecticut's argument that a Republican Party primary election closed to voters affiliated with other political parties was justified in the interest of preventing raiding by non-Republican voters. Under the Connecticut statute, as in Alaska, a voter was allowed to register as a Republican up to primary election day. Given those registration opportunities, the Court reasoned that the need to prevent raiding was simply "not implicated." *Tashjian*, 479 U.S. at 219.

[9] While this dispute was pending below, both Houses of the Alaska State Legislature were organized by legislators affiliated with the RPA.

Based on the foregoing analysis of the prior decisions of this Court, the decision below does not present a conflict that would warrant granting the Writ.

II. THE DECISION OF THE SUPREME COURT OF ALASKA DOES NOT CONFLICT WITH THE PRIOR DECISIONS OF THE UNITED STATES DISTRICT COURT OF ALASKA.

The RPA contends that the decision of the Alaska Supreme Court in this case conflicts with a decision of the United States District Court for the District of Alaska. Of the two cases which considered the validity of the RPA partially closed primary, both were dismissed in the preliminary injunction stage, prior to development of an evidentiary record, and without a decision on the merits.

In 1990, the RPA sought to compel the State to implement a partially closed primary. *Doyle v. Alaska*, No. A90-248 CIV (D. Alaska 1990). The Republican Party sought a preliminary injunction to prevent the State from enforcing Alaska Stat. § 15.25.060 (1988), the statute requiring a blanket primary ballot, and to compel the State instead to conduct the primary in accordance with the RPA rule. U.S. District Judge Holland concluded from a review of the case law that he was foreclosed from ruling on whether the party's rule was constitutionally protected because the rule had not yet been precleared by the Department of Justice under Section 5 of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973c (Law Co-op. 1994 Supp. 1996), and was not yet in effect. *Doyle*, (Order, July 16, 1990) (attached to this brief as appendix I).

In 1992, the RPA again filed suit in the United States District Court for the District of Alaska, seeking declaratory judgment and injunctive relief compelling the State to conduct the August, 1992 primary election as a partially closed primary. *Zawacki v. Alaska*, Case No. A92-414 CIV (D. Alaska 1992). However, before the court could announce a decision on the merits, the parties stipulated to implement a partially closed primary by the adoption of administrative regulations. The court approved the stipulation and subsequently dismissed the case without prejudice. It was the *Zawacki* stipulation that the Alaska Supreme Court determined was not sufficient authority to support a finding of invalidity of the blanket primary statute or to authorize the adoption of regulations that conflict with a statute.

The Writ should not be granted because there is not a conflict between decisions of the Supreme Court of Alaska and the United States District Court for Alaska.

III. THE WRIT SHOULD NOT BE GRANTED BECAUSE THE RECORD IS INSUFFICIENT TO PERMIT DECISION OF THE RPA'S CONSTITUTIONAL CLAIMS.

The basic question of the validity of the underlying blanket primary statute was not addressed until the case was on appeal. In the Superior Court of the State of Alaska, the State defended administrative regulations adopted to implement a separate Republican primary. These regulations were adopted under the assumption that the blanket primary statute was clearly invalid to the extent that it allowed voters affiliated with other political

parties to vote for Republican candidates. For this reason, the State did not make a record below in support of the interests it might have in preserving the blanket primary. The defender of the blanket primary was Michael O'Callaghan, a *pro se* litigant.

Mr. O'Callaghan is not an attorney and, the limited record that exists in this case, will show that he demonstrated a lack of knowledge of court procedure in initiating the case, seeking a default judgment, and later seeking, a summary judgment. O'Callaghan did not pursue discovery and did not present to the Superior Court any evidence concerning the State's legitimate interests in conducting blanket primaries that would be relevant to the balancing of interests required under prior decisions of the Court.

The Alaska Supreme Court ruled that the *Zawacki* stipulation was invalid to the extent that it purported to resolve the issue whether the Alaska statute requiring a blanket primary was unconstitutional. 888 P.2d at 1304. The court also explained that "the State's contention that the blanket primary statute is clearly unconstitutional under *Tashjian* . . . is incorrect." *Id.* at 1305. The court found significant differences in that Connecticut case – particularly the fact that the Connecticut statute invalidated in *Tashjian* prevented the RPA from opening its statutory separate primary to independent voters, while the Alaska statute requires a single blanket primary open to all voters. Given the importance of the issue, which the court said was not "adequately briefed by the parties," the court ordered supplemental briefing and invited other interested parties to participate in that briefing as intervenors or *amici curiae*. *Id.* at 1305-6.

After the order for supplemental briefing, the RPA and a group of voters calling itself Alaskan Voters for An Open Primary (AVOP) were allowed to intervene as parties. The Alaska Federation of Natives and the Alaska Independence Party were permitted to participate as *amici*. The RPA ultimately argued in its brief that it should be allowed to develop a factual record to propound and defend its interests in having a separate and partially closed primary. The State argued that the blanket primary is valid as a matter of law; the State offered an alternate argument that a decision of the case would benefit from a remand to develop a factual record of its interests in perpetuating the blanket primary.

It is uncontroverted that there is nothing in the record other than the briefs of the parties to support their claims. The case was far advanced when the real parties in interest joined issue on the questions presented for review. If the Writ is granted, the Court must determine whether the Alaska Supreme Court properly balanced the interests of the parties. Without a "litmus paper test" it will be difficult to resolve the constitutional claims without a detailed record to assist in the effort.

The State does not intend by this argument to detract from the legal reasoning used by the Alaska Supreme Court, for it is correct on the law. Rather, "patience in the judicial resolution of conflicts may sometimes produce the most desirable results." Stevens, *Some Thoughts on Judicial Restraint*, 66 *Judicature* 177, 183 (1982). The RPA predicts litigation from other states that either have open or blanket primaries on the same questions presented in this case. RPA Pet. at 19-22. Solutions to the questions presented could be further developed by the supreme

courts of other states before they are resolved by this court.[10]

IV. THE COURT SHOULD DENY THE WRIT BECAUSE THE RPA INTENDS TO PRIVATELY NOMINATE CANDIDATES AND FURTHER MULTIPLY THE LITIGATION PERTAINING TO THIS MATTER.

The RPA informed the Court that it has started the process of implementing a private, partially closed primary using mail-in ballots. RPA Pet. at 23. It claims this mail-in primary will take place

> only if this court does not reverse or stay the decision of the Supreme Court of Alaska, such that the 1996 Republican primary election can be conducted according to RPA rules.

Id. This presumably means that the RPA will undertake conduct that may make the instant controversy moot, or raise a question whether it is ripe for review at this time. The new legal issue would involve the extent to which the party can nominate candidates by a partially closed primary process free from state regulation.

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[10] *See, McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied where issue requires "further study" in lower courts "before it is addressed by this Court"); *Gilliard v. Mississippi*, 464 U.S. 867 (1983) (Marshall, J., dissent from denial of certiorari addressed to "those of my Colleagues who agree with me [on the merits] but believe that this court should postpone consideration of the issue until more state supreme courts and federal circuits have experimented with substantive and procedural solutions to the problem").

The RPA appears to be pursuing the opt-out strategy described in the dissenting opinion below. *See* 914 P.2d at 1268 n.8 (Rabinowitz, J., dissenting). Justice Rabinowitz acknowledged a point made by *amicus* Alaska Federation of Natives that the RPA's remedy is not to force the State to operate a primary to its liking but to withdraw from the state nominating process. The party would then privately nominate candidates. Contrary to the remedy mentioned by Justice Rabinowitz, the RPA intends to pursue this strategy even before there is a determination of the validity of the State's blanket primary statute.

The RPA intends to seek a declaration from the United States District Court for Alaska whether a private, partially closed primary may be validly conducted to nominate Republican candidates for the 1996 general election. By following this course of action, the dispute changes from whether the blanket primary is valid to whether the party may operate independently notwithstanding a statute that requires recognized political parties to participate in a blanket primary. The RPA is abandoning the original dispute with the State in favor of establishing a separate nominating process free from legislative interference.

Pursuit of the opt-out strategy makes a decision in this case more in the nature of an advisory opinion. The RPA is embarking on yet another dispute with the State that must progress through the lower courts and may ultimately be resolved by means other than an appeal to this Court. For this additional reason, the Court should not grant the Writ.

CONCLUSION

For the reasons stated in this brief, the Court should deny the petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX I

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

ALLEN GRANT DOYLE, JR., and the REPUBLICAN PART OF ALASKA, Plaintiffs, vs. STATE OF ALASKA, et al., Defendants.	No. A90-248 Civil (Filed July 10, 1992) ORDER (Preliminary Injunction Denied.)

The court has under consideration a motion for preliminary injunction, filed June 11, 1990, by plaintiffs Allen Grant Doyle, Jr., and the Republican Party of Alaska.[1] Doyle is state chairman of the Republican Party of Alaska ("Party"). The motion seeks an order restraining and enjoining the several defendants from conducting the Party's August 28, 1990, primary in any manner other than as provided by Article XIV of the Party's rules, which was adopted in March of 1990 at the party's statewide convention. As part of the desired injunctive relief, plaintiffs additionally request the court to restrain and enjoin defendants from enforcing, in the Party's August

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[1] This action was originally filed in Fairbanks on June 11, 1990, and assigned to District Judge Kleinfeld. Judge Kleinfeld subsequently recused himself, and the case was transferred to Anchorage on June 22, 1990.

primary, two state statutes: As 15.25.060 (requiring a single primary election ballot containing the names of all candidates for each office, grouped by office, without regard to party affiliation) and AS 15.07.070(c) and (d) (which defendants interpret to require that voters designate their party affiliation, or non-affiliation, at least thirty days prior to the primary).

Defendants include the State of Alaska; the State's Division of Elections ("DOE"); David Koivuniemi, the director of the DOE; and Lieutenant Governor Stephen McAlpine, in his official capacity as supervisor of elections. Defendants oppose plaintiffs' motion. A joint *amicus curiae* brief has been filed by the Alaska Federation of Natives and the Alaska Democratic Party. The *amici* also oppose plaintiffs' motion for provisional relief.

Additionally, plaintiffs filed a motion on July 6, 1990, requesting the court to enter an order directing the State of Alaska to make certain submissions to the Voting Section, Civil Rights Division of the Department of Justice, Washington, D.C., (hereinafter referred to as "Voting Section"), pursuant to section 5 of the Voting Rights Act of 1965. On July 9, 1990, defendants filed an opposition to plaintiffs' motion for an order directing submission.

A telephonic status conference was held on July 9, 1990. Counsel for plaintiffs, defendants, and *amici* participated, as well as an attorney from the Voting Section. The court heard oral argument on Thursday, July 12, 1990. For the reasons outlined hereinbelow, plaintiffs' motion for preliminary injunction and motion for an order directing the state to submit matters to the Department of Justice are denied.

Jurisdiction

The motion for preliminary injunction raises federal constitutional issues, as well as certain matters cognizable under the Voting Rights Act of 1965 (as amended), 42 U.S.C. §§ 1971-1974 (1981). Additionally, plaintiffs have moved for an order requiring defendants to submit matters to the Voting Section in accordance with regulations promulgated by the Department of Justice pursuant to the Voting Rights Act. Jurisdiction is, as a general proposition, appropriate under 28 U.S.C. § 1331.

Background

Since 1967, statewide primaries in Alaska have been conducted as "blanket, open" primaries, with respect to the nomination of candidates for elective statewide and federal political offices. AS 15.25.010, *et. seq.* Primary candidates are listed on a single ballot, grouped together by office sought rather than party affiliation. AS 15.25.060. Primary voters are not restricted to voting for candidates who correspond with the individual voter's political party affiliation (or lack thereof). By statute, voters are not eligible to vote in a primary unless they have registered to vote at least thirty days in advance of the scheduled date for a primary. AS 15.07.070. A voter wishing to change his or her existing registration must also do so at least thirty days in advance. AS 15.07.060 lists the information required for registration, but does not include a requirement that a registrant's party affiliation be declared. However, by administrative interpretation, the State has determined that a registrant must

declare party affiliation (or lack thereof) thirty days in advance of an election as part of the registration process.

The Party held its statewide convention in March of 1990. Shortly before the convention began, a delegate to the convention informed Linda Edgeworth, a key staff member at the DOE, that the Party was likely to adopt a rule change regarding the 1990 primary. On March 31, 1990, the convention adopted a party rule directly affecting the manner in which the Party's primary, which is scheduled to be held on August 28, 1990, would be conducted. The newly adopted rule, Article XIV, provides as follows:[2]

> Only registered Republicans, registered independents, and those who state no preference of party affiliation shall be allowed to vote in the Republican primary election for Governor, Lieutenant Governor, U.S. Senator, U.S. Representative, and members of the State Legislature.

The party clearly desired that its new rule be implemented by defendants in time for the August 1990 primary. A copy of the rule was hand-carried to Linda Edgeworth's office on April 2, 1990. Lieutenant Governor McAlpine's office was notified telephonically on April 9, 11, 12, and 16 regarding the newly adopted rule. On April 20, 1990, the Party wrote a letter to McAlpine's office. The full text of the new rule was set forth in the letter, and the

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[2] Although the rule is silent on the subject, the Party intended that any voter might change his designated party affiliation at the polls on the day of the primary election *and* thereby qualify to vote in the Republican primary.

Party requested McAlpine to revise the voting procedures for the August 1990 primary to properly implement the new rule change. The Lieutenant Governor's office received the letter on April 27. Defendant Koivuniemi received a telefaxed copy of the same letter on April 25, 1990, and James Baldwin of the state Attorney General's Office also received a copy in late April. By letter dated May 5, 1990, Ken Jacobus advised Stephen McAlpine of certain case law authority upon which the Party relied in adopting the new rule. A copy of Jacobus' May 5 letter was also sent to defendant Koivuniemi.

After this initial flurry of activity, the Party waited for the outcome of the Alaska Democratic Party convention, held in Nome in mid-May. The Party apparently expected that the Democrats would adopt a similar rule change, but they did not.

After the Democratic convention, the Party began a series of earnest contracts with defendants to ensure that defendants would and could implement the rule change in time for the August primary. These contracts have been extensively briefed by the parties and the court only summarizes them herein.

On May 24, 1990, a telephone conference was held by defendant Koivuniemi. Participants included Ken and Cheri Jacobus, counsel for the State, and key State election officials. Among other things, Koivuniemi expressed concern regarding the State's ability to properly implement the new rule, given the short time remaining before the primary. He opined that the rule was ambiguously

worded and requested clarification on the Party's proposal that voters be permitted to change their party registration as late as the day of polling. There was also discussion regarding the manner in which absentee ballots would have to be handled if the rule were implemented for the August 1990 primary. On May 28, 1990, Kenneth Jacobus, Party counsel, sent a follow-up letter to Koivuniemi addressing the aforementioned concerns.

A second telephone conference was held by Koivuniemi on June 5, 1990, with essentially the same participants as before. Again, the discussion centered on several specific logistical problems (preparation of primary ballots, mailing of absentee ballots, and so forth) that the State felt must be resolved in order to properly implement the new rule.[3] During this telephone conference, the Party learned that it needed to "preclear" its rule change with the Voting Section. Nothing was resolved in the second telephone conference. The State firmly maintained that it would apply the thirty-day registration requirement with respect to changes of party affiliation in conjunction with implementing the new rule, and generally reiterated its belief that insufficient time remained for implementation. The Party then made a submission to the Voting Section, to which the State formally objected by its letter to the Department of Justice dated June 15, 1990, and in a follow-up letter dated

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[3] The extensive regulatory changes that the State believes necessary to implement the rule change for the August primary are thoroughly documented in the two affidavits of Linda Edgeworth filed in this action.

June 25, 1990. The instant action was filed on June 11, 1990.

Applicability of the Voting Rights Act

The primary purpose of the Voting Rights Act ("Act") is to extend the protection of the fifteenth amendment to members of racial and language minorities, to prevent discrimination in the form of denial or abridgement of the right to vote. *State of South Carolina v. Katzenbach*, 383 U.S. 301, (1966). Of particular concern are voting qualifications, prerequisites, standards, practices, or procedures which might have a racially discriminatory effect. Section 5 of the Act requires that any jurisdiction "covered" by the Act may not enforce any change pertaining to the manner in which elections are conducted without obtaining a declaratory judgment from the District Court for the District of Columbia that the proposed change is not discriminatory within the meaning of the Act. 42 U.S.C. § 1973c. Alternatively, a covered jurisdiction may satisfy the requirements of Section 5 by submitting the proposed change, along with certain supporting documents, to the Attorney General of the United States for "preclearance". *See generally*, 28 C.F.R. § 51 (1990); *see also, Allen v. State Board of Elections*, 393 U.S. 544, 549-50 (1969). The United States Supreme Court has consistently construed Section 5 to have the broadest possible scope. *Perkins v. Matthews*, 400 U.S. 379, 387 (1971). This has resulted in jurisdictions routinely submitting a plethora of proposed election changes to the Attorney General, some of which are very minor in nature. *See*, 28 C.F.R. § 51.12. While most of the submissions are provided by states, political parties are subject to Section 5 of the Act

and its preclearance requirements. 28 C.F.R. § 51.7 provides in part:

> Certain activities of political parties are subject to the preclearance requirement of Section 5. A change affecting voting effected by a political party is subject to the preclearance requirement: (a) If the change relates to a public electoral function of the party and (b) if the party is acting under authority explicitly or implicitly granted by a covered jurisdiction or political subunit subject to the preclearance requirement of section 5. . . . . Changes with respect to the conduct of primary elections at which party nominees . . . are chosen are subject to the preclearance requirement of section 5 . . . .

Submissions are made to the Voting Section. Under pertinent regulatory guidelines, the Attorney General has sixty days in which to review a submitted election change. 28 C.F.R. § 51.9. However, if a submitting jurisdiction materially supplements its original submission, then a new sixty-day period of consideration may go into effect. 28 C.F.R. § 51.30. If the Voting Section objects to the proposed change, the submitting party may request reconsideration. This, too, results in a new sixty-day period for review by the Voting Section. 28 C.F.R. § 51.45.

In this case, it is agreed that Alaska is a "covered" jurisdiction (see, 28 C.F.R. § 55 Appendix) and that the Party's new rule is subject to the preclearance requirement of Section 5 of the Act. Pursuant to 28 C.F.R. § 51.7, the Party made its submission on June 7, 1990 and requested expedited consideration. The party subsequently learned that defendants would also have to submit any new regulations and guidelines developed to

implement the Party rule. *See*, 28 C.F.R. § 51.22. After contacting counsel for the Voting Section, the Party learned that the Voting Section would concurrently consider defendants' proposed implementation guidelines, notwithstanding that defendants are not required to submit such guidelines until the Party's rule had already been precleared. Counsel for the Voting Section *suggested* to defendants that they prepare a submission for concurrent consideration. Plaintiffs filed a motion on July 6, 1990, requesting the court to order defendants to make their submission immediately. In the telephonic status conference held July 9, 1990, defendants averred that they have been working diligently to prepare the submission, and that it should be sent to the Voting Section, by express mail, on July 13, 1990. This was confirmed at oral argument on July 12, 1990.

In the July 9 status conference, counsel for the Voting Section indicated that the Voting Section had received several supplementations from the Party, the latest having been received that day. The court was also advised that the Voting Section would likely consider the latest supplementation to be a "material" one, such that a new sixty-day review period had begun to run; that the Voting Section viewed the Party rule as presenting a fairly substantive change which would require thorough review; and that it intended to obtain additional input from interested parties, particularly the Native voters in Alaska.

Thus, plaintiffs seek provisional relief from this court *prior* to any preclearance decision by the Voting Section. The parties are in agreement that the rule change cannot be validly employed in an election without preclearance from the Voting Section. The court's research shows this

to be correct. *See, e.g.*, 28 C.F.R. § 51.1, 51.10. The Supreme Court has consistently so held. *See, Connor v. Waller*, 421 U.S. 656 (1975) (per curiam) (changes not precleared pursuant to Section 5 are "not effective as law"); *Georgia v. United States*, 411 U.S. 526, 538 (1973) (election laws are "frozen" until declaratory judgment or preclearance is obtained); *City of Rome v. United States*, 446 U.S. 156, 160-61, *reh'g denied*, 447 U.S. 916 (1980) (preclearance required); *McDaniel v. Sanchez*, 452 U.S. 130, 137 (1981) (laws not effective without preclearance).

The Party would have the court enter a prospective order enforcing the new rule for a Republican primary conditioned upon Voting Section clearance of the rule. To grant such an order, the court must necessarily evaluate the Party's alleged constitutional rights which, if established, would support implementation of the rule. In voting rights cases, it has been held that it is error for a court to adjudicate such constitutional claims until the Voting Section acts on the proposed change in voting rules.[4] This court concludes that it is presently foreclosed

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[4] *See, e.g., McDaniel v. Sanchez*, 452 U.S. 130, 146 (1981) (quoting *Wise v. Lipscomb*, 437 U.S. 535, 542 (1978)); *United States v. Board of Supervisors*, 429 U.S. 642, 646-47 (1977); and *Connor v. Waller*, 421 U.S. 656 (1975) (per curiam). *Cf. Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex. 1982), wherein plaintiffs raised constitutional challenges both to the existing Texas voter apportionment scheme and to a new apportionment plan adopted by the state. The three-judge court struck down the existing scheme, but held that it could not adjudicate the constitutionality of the new plan which had failed to obtain Department of Justice preclearance. However, the court retained jurisdiction in order to fashion an emergency apportionment plan for upcoming statewide elections, and the plan was

from ruling upon whether the Party's rule is constitutionally protected until the rule becomes operative and effective by virtue of Voting Section review and approval. To act sooner would amount to the court rendering an advisory decision in violation of article III, section 2, of the United States Constitution.

Preliminary Injunction Analysis

The foregoing discussion disposes of plaintiffs' motion for preliminary injunction and, indeed, suggests that plaintiffs; complaint is subject to dismissal on the theory that there is not presently any justiciable case or controversy. For the sake of completeness, and in order that the court's entire analysis of plaintiffs' motion may be available for possible appellate review, the following additional discussion of the matters before the court are included.

In a straightforward fashion, plaintiffs seek to have the court order the defendants to place the new Republican primary rule into effect. They claim that their decision to alter the primary is fully supported by constitutional case law construing the first amendment rights of association enjoyed by state political parties. Plaintiffs principally rely on the holdings in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); and *San Francisco County Democratic Central Committee v. Eu*,

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ordered without preclearance. *Id.* at 525-526 n.14 (citing *Conner v. Waller*, 421 U.S. at 656-57 (inability to adjudicate constitutional claims regarding new plans does not divest district court of jurisdiction to order a temporary plan)).

792 F.2d 802 (9th Cir. 1986), *vacated & remanded*, 479 U.S. 1024, *on remand*, 826 F.2d 814 (9th Cir. 1987), *affirmed*, 489 U.S. 214 (1989). Plaintiffs see two primary benefits resulting from the new rule: a decreased opportunity for crossover voting ("raiding"), and a chance to strengthen the Party by nominating and electing Republican candidates who are more consistent in their party's ideology.

Defendants acknowledge the rights of association at issue here, but contend that the State of Alaska has certain compelling governmental interests which must be balanced against plaintiffs' alleged right to alter the primary. Specifically, defendants aver that the State has a duty to ensure the integrity and orderliness of elections, and that insufficient time remains before the August primary in which to properly implement the Party rule and still fulfill that duty. Within that duty, defendants express two major concerns: that the State must shoulder an unacceptable administrative burden to make all the necessary changes to implement the Republican primary, and that many voters (particularly rural voters, many of whom are Native and protected under the Voting Rights Act) will be confused and possibly disenfranchised due to the late change in the primary election procedures.

In addition to their Voting Rights Act arguments, *amicus* Alaska Federation of Natives expresses two concerns. First, it argues that implementation cannot be smoothly carried out in the few weeks remaining until the primary election, which will result in confusion and disenfranchisement among Native voters who will not be properly and timely advised of the changes. Secondly, the Federation contends that Native voters have traditionally benefitted from being able to employ crossover voting to

build political coalitions helpful to Native causes. In a related vein, the Alaska Democratic Party asserts that it still welcomes Republican voters crossing over in the primary.

The Ninth Circuit recently articulated and summarized the pertinent factors which a district court must consider in deciding whether to grant or deny injunctive relief. *State of Alaska v. Native Village of Venetie,* 856 F.2d 1384 (9th Cir. 1988). Those four factors are:

> (1) The likelihood of the plaintiff's success on the merits;
>
> (2) the threat of irreparable harm to the plaintiff if the injunction is not imposed;
>
> (3) the relative balance of this harm to the plaintiff and the harm to the defendant if the injunction is imposed; and,
>
> (4) the public interest.

Id. at 1388. The court went on to note that the four factors can really be condensed into two factors: the likelihood of success on the merits and the relative balance of potential hardships to the plaintiff, the defendant, and the public. *Id.* at 1189. Those two primary factors have been employed in a test framed in the alternative, though the alternatives are really to be treated by the district court, for analytical purposes, as "extremes of a single continuum." *Id., quoting Benda v. Grand Lodge of International Association of Machinists & Aerospace Workers,* 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed,* 441 U.S. 937 (1979). The alternative test has been framed thusly:

> Basically, plaintiffs are entitled to preliminary injunctive relief if:

1) They demonstrate
   - a probable success on the merits, and
   - a possibility of irreparable injury;

2) or if they demonstrate
   - a fair chance of success on the merits (*i.e.*, serious questions are raised), and
   - the balance of hardships tips sharply in their favor.

Native Village of Venetie, 856 F.2d at 1389.

Applying the foregoing, the Court will first focus upon the issue of probable success on the merits. As discussed above, the court cannot say that plaintiffs will probably succeed on the merits. At the most, plaintiffs raise a serious question. The court accepts, and the defendants themselves appear to accept, plaintiffs' contention that first amendment rights of free association are substantially implicated in the rule change which the Party would put into effect. The United States Supreme Court has recognized this right in its decision in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986). As important as these rights may be, however, there is little chance of plaintiffs prevailing on the merits of the present complaint because, as set out above, the Party seeks to enforce an inchoate rule – that is, a rule raising serious constitutional questions which this court does not presently have the power to reach due to the absence of Voting Rights Act preclearance.

The foregoing appraisal of the Party's chances of success on the merits calls into play that portion of the test for granting or denying preliminary injunctions

which calls upon a plaintiff to demonstrate that the balance of hardships tips sharply in the plaintiff's favor. In this case, the court concludes that the hardships are substantially in equipoise.

The court's refusal to order implementation of the Party's primary election rule will result in the conduct of a "blanket" open primary in which registered members of other political parties can vote in the Republican Party primary. The court's decision forces the Republican Party to associate with those Democrats or Alaska Independence Party members who would cross party lines and vote for a Republican in the upcoming primary election. The harm is of a nature which is substantially irreparable.

On the other side, defendants and *amici* argue persuasively that rural Alaskans will be disenfranchised because of the complexity of regulatory changes which must take place in order to implement the Party's new primary rule. While the State of Alaska is blessed with substantial means of communication between large cities and most of the very small villages in the state, the court is convinced, on the basis of defendants' showing, that there is inadequate time to formulate the rule changes, educate the rural election workers, and still provide time enough for the latter as well as others using public radio, television, and other means of communication to educate the public as to the options available to them in the upcoming primary election under the Party's new rule. Especially troubling to the court is the Party's suggestion that, under its rule, an individual voter might be entitled to vote in both the Republican primary and the "other" primary as well. The possibility of a voter having two votes (one in each primary) strikes the court as dramatic

proof of the complexity (which the court did not initially perceive) of educating the electorate.

Similarly, the defendants' approach to structuring ballots, were the Party's rule to be implemented, suggests further complexities. The defendants suggest that the Republican Party ballot should list all candidates, of whatever party, such that Republicans could vote for whomever they wish; and that the "other" primary should list all candidates except Republican candidates. The court's initial reaction to this proposed implementation of the Party's rule was that it stood the rule on its head. On further reflection, the court is still of a view that the State's suggestion for the ballot structure is disingenuous; but the mere fact that it is a plausible approach to implementation of the rule further underscores the complexity of conducting simultaneously two or more primary elections when the rules for all are not the same and where, as here, a certain amount of crossover voting is still allowed. Thus the court has concluded that there is a substantial risk that the defendants will be unable to adequately instruct the electorate in time for an August 28, 1990, primary election, and that some will be discouraged from voting and others will be at best confused, and at worst misled, despite everyone's best efforts as regards exercising their vote. The court views this type of hardship as irreparable also.

Understandably, neither the Party nor the defendants have attempted, nor is it likely that they would be able to quantify in a meaningful fashion the extent of hardship occasioned by the harm to which the court perceives each side to be exposed. Given the prospective nature of the analysis, it is not possible to say how many votes may be

cast by Democrats in what should be a Republican rule primary, nor is it possible to say how many voters may be disenfranchised because of inadequate opportunity to construct a new primary election procedure and implement it. This much the court can say very readily: The balance of hardships certainly does not tip sharply in the Party's favor. In a very rough sense, the amount of harm to which each is exposed is the same; and, in the absence of any other proof, the court concludes that the harm to the Party and to the voters who may be disenfranchised is roughly equal.

In addition, the public interest has a part in the balance of hardships which is not addressed by the foregoing. *Native Village of Venetie,* 856 F.2d at 1388. In this case, the court perceives there to be a substantial public interest in having elections conducted timely and in an orderly fashion. *Coghill v. Boocher,* 511 P.2d 1297 (Alaska 1973); *Tarrazas v. Clements,* 537 F. Supp. 514, 527 (N.D. Tex. 1982).

The Party, on brief and in oral argument, has made fleeting reference to the possibility of deferring the primary election in order to afford more time for instruction to the voters and more time for the Department of Justice to clear the Party's new primary election rule. The foregoing authorities suggest that such action should not be taken except for very compelling reasons. The court perceives no compelling reason to disrupt the normal election process in this case. It takes no great amount of imagination, nor is it unduly speculative, for the court to suggest that a delay in the primary election risks changing the chemistry of the election itself. It is impossible to say what changes might occur between August 28, 1990,

and some subsequent date to which an election might be postponed. Inevitably, a change in the election date will affect the ability or willingness of some voters to participate in the election. Thus the public interest consideration adds weight on the defendants' side of the balance of hardships, not the plaintiffs.

Finally, and not a part of the general calculus for granting or denying preliminary injunctions, the court has given some small consideration and weight to the defendants' contention that the Party has delayed seeking to affect the rights which it would have the court order. Injunctive relief is equitable in nature, and the court has the discretion to consider whether or not the party seeking injunctive relief has timely moved to protect his or its interests. In this instance, there is an element of delay on the part of the Party. The Party might have sought preclearance from the Voting Section of the Department of Justice immediately upon adopting its rule for a Republican primary election. It did not do so. The Party delayed more than sixty days between the adoption of its rule and the presentation of the matter to the Department of Justice. At the conclusion of oral argument, the court suggested that the Party was accountable for some laches or delay in pursuing its rights. On further reflection, the court has come to doubt that the loss of sixty days' time for consideration of the Party's rule by the Department of Justice has any role in determining, as between the Party and the defendants, whether a preliminary injunction should issue. There was no delay on the part of the Party in its dealings with the defendants, and the Party has already been saddled with the effect of its delay before the Justice Department when the court held that it was

without power to consider the constitutional aspects of the Party's new primary election rule because the Voting Section had not acted.

For the foregoing reasons, the court would deny a preliminary injunction even if it had the power to consider the merits of plaintiffs' complaint.

Plaintiffs have also moved for an order requiring the State of Alaska to immediately make its submission to the Department of Justice, Voting Rights Section. This motion is now in substance moot in light of the fact that the plaintiffs' motion for preliminary injunction has been denied. More generally, the parties now seem in agreement that there is no regulatory requirement that the State file its procedures with the Department of Justice until after the Voting Section has acted upon the Party's presentation. *See* 28 C.F.R. § 51.22.

Accordingly, the plaintiffs' motion with regard to the State filing with the Department of Justice is denied.

Finally, the Party has suggested that the court must rule upon certain state law questions which it fears will be outside the purview of the Justice Department's Voting Section. Here the Party has reference to disagreements with the State as to (among other things) whether a voter's party designation may be changed on the day of election or whether it must be changed thirty days in advance. These matters present state law questions which are not necessarily raised by the motions presently before the court, and the court declines to offer any opinion on these issues at this time.

DATED at Anchorage, Alaska, this 13th day of July, 1990.

/s/ H. Russel Holland
United States
District Judge

cc: W. Ross (ROSS)
K. Jacobus
AAG-K
J. Rubini (BIRCH)

APPENDIX 2

CHARLES E. COLE
ATTORNEY GENERAL

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Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT ANCHORAGE

CONSTANCE L. ZAWACKI and the REPUBLICAN PARTY OF ALASKA, INC., Plaintiffs, v. STATE OF ALASKA; STATE OF ALASKA DIVISION OF ELECTIONS; LIEUTENANT GOVERNOR JACK COGHILL, in his official capacity of Supervisor of Elections; and CHARLOT THICKSTUN, in her official capacity of Director of Division of Elections, Defendants.	(Filed Jul. 9, 1992) **STIPULATION AND APPROVAL** Case No. A92-414-CIV

The parties stipulate that in light of the Court's preliminary conclusion that the Lt. Governor has the authority to promulgate regulations implementing the

principles enunciated in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the Lt. Governor will adopt emergency regulations that:

(1) Provide for two separate ballots for the primary election, as follows:

(a) A Republican only ballot containing names of Republican candidates only and available only to Republican, nonpartisan and undeclared voters, and

(b) a statutory ballot containing candidates of all other parties and available to all voters.

The parties also stipulate that:

(2) A voter may only select and vote one ballot;

(3) That this case is dismissed by joint agreement of the parties.

DATED: July 9, 1992 CHARLES E. COLE
ATTORNEY GENERAL

By: /s/ Nancy R. Gordon
Assistant Attorney
General

DATED: July 9, 1992 /s/ Kenneth P. Jacobus
Kenneth P. Jacobus

ORDER

IT IS SO APPROVED and this case is hereby dismissed without prejudice.

Dated this 10 day of July, 1992 in Anchorage, Alaska.

/s/ James K. Singleton
JAMES K. SINGLETON
U.S. DISTRICT
COURT JUDGE

CC: K. Jacobus
E. Boyko (BOYKO)
D. Clocksin (WAGSTAFF)
K. Morford (JENSEN)
B. Botelho AG-200)
J. Rubini (BIRCH)